U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUL 0 6 2015

FILE #:
PETITION RECEIPT #:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision.** The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before us on motions to reopen and reconsider. We will grant the motion to reopen, dismiss the motion to reconsider, and affirm the denial of the petition.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a pediatric cardiology fellow at the The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. We dismissed the petitioner's appeal on November 4, 2014. A fuller discussion of the underlying issues appears in our appellate decision.

On motion, the petitioner submits a brief and additional evidence. The petitioner requests that we reopen and reconsider the matter, and approve the petition. On March 31, 2015, we requested further evidence demonstrating the impact of the petitioner's work in his field. The petitioner responded by submitting additional letters of support and further documentation of his qualifications and activities in the field. For the reasons discussed below, the record does not establish that an exemption from the requirement of a job offer would be in the national interest of the United States. Accordingly, we will affirm our appellate decision and uphold the denial of the petition.

I. LAW

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's

> services in the sciences, arts, professions, or business be sought by an employer in the United States.

The record reflects that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." *In re New York State Dept of Transportation*, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that he seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

Although the national interest waiver hinges on prospective national benefit, the petitioner must establish his past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that he will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the petitioner, rather than to facilitate the entry of an individual with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

Furthermore, eligibility for the waiver must rest with the petitioner's own qualifications rather than with the position sought. Assertions regarding the overall importance of a petitioner's area of expertise cannot suffice to establish eligibility for a national interest waiver. *Id.* at 220. At issue is whether this petitioner's contributions in the field are of such significance that he merits the special benefit of a national interest waiver, a benefit separate and distinct from the visa classification he seeks. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

II. ANALYSIS

The petitioner filed the Immigrant Petition for Alien Worker (Form I-140), on August 15, 2013. The petitioner has already established the intrinsic merit and national scope of his research in pediatric cardiology and, therefore, he satisfies the first two *NYSDOT* factors. The remaining issue is whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Our appellate decision upheld the director's determination that the

petitioner's impact and influence on his field did not satisfy the third prong of the *NYSDOT* national interest analysis.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

On motion and in response to our Request for Evidence (RFE), the petitioner submitted his updated curriculum vitae, additional letters of support, further documentation of his published and presented work, and two Google Scholar citation reports (2014 and 2015) for his published articles. With regard to the petitioner's published and presented work, there is no presumption that every published article or conference presentation demonstrates influence on the field as a whole; rather, the petitioner must document the actual impact of his article or presentation. Frequent and favorable independent citation of an article authored by the petitioner may indicate that other researchers are familiar with his work and have been influenced by it. A less extensive citation record, on the other hand, is generally not probative of the petitioner's impact in the field.

The petitioner's most recent citation report from Google Scholar reflects that:

1.
2.
3.
4.
5.

The submitted citation reports from Google Scholar do not indicate how many of the preceding citations are self-citations by the petitioner or his coauthors. Self-citation is a normal, expected practice. Self-citation cannot, however, demonstrate the response of independent researchers. The petitioner has not established that the number of independent cites per article for his published work is indicative of influence on the field as a whole.

The petitioner submitted a December 2014 letter from Dr. a clinical professor of pediatrics at asserting that the petitioner has served as Principal Investigator in a number of important research projects including:

- A major multi-center study entitled '
  ;

- [redacted]; and
- [redacted]

On March 31, 2015, we requested that the petitioner submit documentary evidence from the funding organizations for the above research projects showing the purpose, form, amount, dates of funding, the named recipients, and the process by which such funding was obtained. The petitioner's response to our RFE, however, did not include the requested documentation.

With regard to the petitioner's study entitled '[redacted]" Dr. [redacted] states:

> Preliminary results from this study have been submitted to be presented at the next [redacted] annual conference and the findings are significant. It is found that cardiac catheterization improves patients' exercise capacity and reduces breathlessness. Once the results are final and published, his work would cause treatment practices across the nation to change.

Dr. [redacted] asserts that the petitioner's work, once published, "would cause treatment practices across the nation to change," but there is no documentary evidence demonstrating that the petitioner's findings have already had such a national effect. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Dr. [redacted] expectation regarding the possible future impact of the petitioner's work is not evidence of the petitioner's eligibility at the time of filing. In response to our RFE, the petitioner submitted conference materials from the [redacted] annual meeting reflecting that he presented the results of the study in [redacted] more than twenty months after the Form I-140 petition was filed.

Dr. [redacted] further states that the petitioner has "made significant contributions to surgical repair methods for two separate commonly-occurring congenital bean defects, [redacted] and the [redacted]" While Dr. [redacted] goes on to discuss the potential of the petitioner's [redacted] and [redacted] studies, he does not provide specific examples of how the petitioner's findings have already influenced surgical practices in the United States or have otherwise affected the field as a whole.

Dr. [redacted] continues:

> [The petitioner] is also a principal investigator for a research project looking at reducing radiation exposure during cardiac catheterization procedure to close [redacted]. The results of this study have been accepted for publication in the journal [redacted]

> They show that reducing fluoroscopy frame rate to 4 fps (frames per second) significantly reduces radiation exposure in children without increasing procedure time/complications. Once published the results are sure to bring about a change in the interventional cardiology community to reduce default x-ray machine fluoroscopy rates for such procedures (from a standard rate of 7.5 fps or 15 fps) to 4fps and hence decrease unnecessary radiation exposure in children.

Again, Dr. asserts that the petitioner's results, once published, "are sure to bring about a change in the interventional cardiology community to reduce default x-ray machine fluoroscopy rates," but there is no documentary evidence demonstrating that the petitioner's findings had already achieved that effect at the time of filing on August 15, 2013. As mentioned previously, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. In response to our RFE, the petitioner submitted the aforementioned article in We note, however, that the article was not published until January 2015, seventeen months after the Form I-140 petition was filed.

Dr. further states:

> [The petitioner] made an important contribution to pediatric cardiology while at the Postgraduate in his native India. This project examined extubation, or the removal of infants from ventilators. In his study, [the petitioner] discovered two risk factors for extubation failure – anemia and the congenital heart condition called . He further found that correcting hemoglobin levels prior to extubation improved outcomes. This work led directly to a change in treatment practices in the hospital where the [the petitioner] conducted his study; further, the results were disseminated through publication and presentations and medical conferences.

Dr. mentions that the petitioner's "work led directly to a change in treatment practices in the hospital where the [the petitioner] conducted his study," but did not indicate that the petitioner's work, once disseminated, led to procedural changes at other hospitals. There is no documentary evidence showing that the petitioner's published and presented work has been frequently cited by independent researchers or has otherwise influenced the field as a whole.

The petitioner also submitted a letter from Dr. a professor of pediatrics at stating: "As part of his continued training [the petitioner] has participated in 470 cardiac catheterizations in children and adults with congenital heart disease. This includes 210 cardiac catheterizations since July 2014." In addition, Dr. asserts that the petitioner "is proficient and clinically competent in all aspects of diagnostic and interventional cardiac catheterization" and then lists seventeen medical procedures in which the petitioner is skilled. Any assertion that the petitioner possesses useful skills, or a "unique background" relates to whether similarly-trained workers are available in the United States and is an issue under the jurisdiction of the U.S. Department of Labor through the labor certification process. *NYSDOT*, 22 I&N Dec. at 221. Dr. does not explain how the petitioner's work has influenced the field as a whole.

The petitioner also submitted an April 2015 letter from Dr. , Development Coordinator, stating:

> [The petitioner] recently published his research on radiation exposure during device closure in the cardiac catheterization laboratory. His article is titled " and was published in the journal of
>
> [The petitioner] showed from his research that by reducing the x-ray fluoroscopy frame rate during this procedure, the procedure could be performed with similar efficacy but with less radiation exposure to children. . . . [M]ost catheterization laboratories around the world still use high frame rates in the range of 10 to 15 frames per second. [The petitioner] showed that this can be safely reduced to as low as 4 frames per second. . . . Based on [the petitioner's] peer-reviewed and published data, I have personally lowered fluoroscopy rates during cardiac catheterization procedures at and at the 6 major sites around the world where I work to 4 frames per second.

In addition, the petitioner submitted an April 2015 letter from Dr. an Assistant Professor of Pediatrics and Internal Medicine at the . Dr. also comments on the petitioner's recent article in stating:

> [The petitioner] showed from his research that by reducing the x-ray fluoroscopy frame rate during this procedure, the procedure could be performed with similar efficacy but with less radiation exposure to children. Most catheterization laboratories in the country still use high frame rates in the range of 7.5 to 15 frames per second. [The petitioner] showed that this can be safely reduced to as low as 4 frames per second. We have already taken several measures to reduce radiation exposure in the cath lab and we plan to change the default fluoroscopy rate in our catheterization lab to 4 fps.

The identical sentences in Dr. and Dr. letters suggest the language in at least one of the letters was not written independently. While it is acknowledged that Dr. and Dr. have provided their support to this petition, it is unclear whether the letters reflect their independent observations and thus an informed and unbiased opinon of the petitioner's work. In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In addition, U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* Based on the identical sentences in Dr. and Dr. letters, USCIS may accord them less weight.

Regardless, neither of their letters demonstrates that the petitioner's findings in had influenced the field at the time of filing. As mentioned previously, the petitioner's article in was not published until January 2015, seventeen months after the Form I-140 petition was filed. Therefore, any resulting impact on the medical institutions with which Dr. and Dr. are affiliated post-dates the filing of the petition. Again, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49.

The petitioner also submitted e-mails from 2014 and 2015 reflecting that he was requested to peer review four manuscripts for and One of the e-mails thanks the petitioner "for agreeing to review" a manuscript, but there is no documentary evidence showing that the petitioner actually completed any of the four reviews. Regardless, all of the peer review requests post-date the filing of the petition. As mentioned previously, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Furthermore, there is no evidence demonstrating that the petitioner's occasional participation in the widespread peer review process is an indication that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

In addition, the petitioner submitted his licenses and professional certifications, a January 2015 job offer letter from the reflecting that the petitioner commanded a salary of $210,000.00, compensation data for medical school faculty positions compiled by the Association of Administrators in Academic Pediatrics, his professional association memberships, and a 2015 "Best of the Best" abstract award in the " " of the Annual Meeting. Many of these occupational qualifications and professional accomplishments post-date the filing of the Form I-140 petition. Again, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Furthermore, licenses and professional certifications, salary information, and recognition for achievements are elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(D), (E), and (F), respectively. However, in this instance the petitioner is seeking a waiver of the job offer as a member of the professions holding an advanced degree.

We note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. Pursuant to section 203(b)(2)(A) of the Act, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. *NYSDOT*, 22 I&N Dec. at 218, 222. Therefore, whether a given individual seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that individual cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his field of expertise. The national interest waiver is an additional benefit, separate from the classification sought, and therefore eligibility for the underlying classification does not demonstrate eligibility for the additional benefit of the waiver. Without

evidence showing that the petitioner's pediatric cardiology work has affected the field as a whole, we cannot conclude that he has demonstrated eligibility for the national interest waiver.

Particularly significant awards may serve as evidence of the petitioner's impact and influence on his field, but the petitioner has not demonstrated that his 2015 "Best of the Best" abstract award has significance throughout the field as a whole, not just within the confines of the Annual Meeting. Regardless, the petitioner received the award more than twenty months after filing the Form I-140 petition. Again, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, we cannot consider an award received by the petitioner after August 15, 2013, as evidence to establish his eligibility at the time of filing.

With respect to the petitioner's motion to reopen, the new facts and supporting documentary evidence offered on motion are not sufficient to overcome the grounds underlying our previous findings.

In support of the motion to reconsider, the petitioner quotes from a letter previously submitted by Dr. an associate clinical professor of pediatric cardiology at Dr. commented on a project in which the petitioner studied "premature extubation (that is, removal of infants from ventilators." Dr. asserted that the petitioner's research "led to practice changes and health care savings by revising treatment protocols in the extubation . . . of newborns who are unable to breath on their own, in order to avoid post-extubation complications." Dr. further stated that the petitioner's "research led to change of practice in the neonatal intensive care unit where the study was conducted, and has been published and presented at scientific conferences." She did not indicate that the petitioner's work, once disseminated, had led to procedural changes at any other hospitals.

In addition, the petitioner quotes from letters previously submitted by Dr. an associate professor at Dr. a staff pediatric cardiologist at the ; and Dr. an associate professor at Dr. Dr. and Dr. indicated that the petitioner's work has been published in medical journals and presented at scientific conferences. With regard to the petitioner's published and presented work, there is no documentary evidence showing that the petitioner's findings have been frequently cited by independent researchers or have otherwise affected the field as a whole. Although the petitioner's cardiology research may have value, any research must be original and likely to present some benefit if it is to receive funding and attention from the medical or scientific community. In order for a university, publisher or grantor to accept any research for graduation, publication or funding, the research must offer new and useful information to the pool of knowledge. Not every scientist who performs original research that adds to the general pool of knowledge in the field inherently serves the national interest to an extent that is sufficient to waive the job offer requirement.

The petitioner compares the documentary evidence of his accomplishments to that of the plaintiff in *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). *Kazarian*, however, involved a different

immigrant visa classification than the one the petitioner seeks in the present matter. Specifically, *Kazarian* involved an individual seeking classification as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A). In *Kazarian*, the court set forth a two-part review where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination. The court in *Kazarian* upheld the AAO's determination that the plaintiff had not satisfied the initial evidence requirements set forth at 8 C.F.R § 204.5(h)(3), which requires documentation of a one-time achievement or evidence that meets at least three of the ten regulatory criteria. The petitioner mentions the concurring opinion of Justice Pregerson who stated: "Although . . . Dr. Kazarian did not submit three of the types of evidence required for the 'extraordinary visa,' he would have been an excellent candidate for an 'exceptional ability' visa." *Kazarian*, 596 F.3d at 1123. As previously mentioned, exceptional ability, defined at 8 C.F.R. § 204.5(k)(2) as "a degree of expertise significantly above that ordinarily encountered" in a given field, does not demonstrate eligibility for the additional benefit of the national interest waiver. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. *See NYSDOT*, 22 I&N Dec. at 218, 222. While Justice Pregerson indicated that the plaintiff in *Kazarian* "would have been an excellent candidate for an 'exceptional ability' visa," he did not specifically comment about the plaintiff's eligibility for the national interest waiver pursuant to section 203(b)(2)(B)(i) of the Act. Accordingly, the accomplishments of the plaintiff in *Kazarian* do constitute proper bases for comparison with regard to the petitioner's national interest waiver determination.

The petitioner also mentions a November 20, 2014, memorandum from Jeh Johnson, Secretary of the U.S. Department of Homeland Security, to León Rodríguez, Director of USCIS, entitled "Policies Supporting U.S. High-Skilled Businesses and Workers." With respect to the national interest waiver, the memorandum states: "This waiver is underutilized and there is limited guidance with respect to its invocation. I hereby direct USCIS to issue guidance or regulations to clarify the standard by which a national interest waiver can be granted, with the aim of promoting its greater use for the benefit of the U.S. economy." The petitioner requests that USCIS' decision "be reconsidered in light of this directive," as the petitioner's work "helps to bring about lower health care costs." USCIS, however, has not yet issued any new guidance or regulations clarifying the national interest waiver eligibility standards in response to the Secretary's memorandum, and the memorandum does not itself set forth any specific guidance. A concern about underutilization of the national interest waiver benefit in general is not indicative that any particular decision USCIS has previously issued constituted an error of law or policy. The existing *NYSDOT* guidelines require the petitioner to establish that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications, and the petitioner has not done so in this matter. *See NYSDOT*, 22 I&N Dec. at 217-18. With regard to following the guidelines set forth in *NYSDOT*, USCIS, by law, does not have the discretion to ignore binding precedent. *See* 8 C.F.R. § 103.3(c). Regardless, the record does not include any documentary evidence showing that the petitioner's research work has helped to bring about lower health care costs such that it has had a national effect.

The petitioner does not support the motion to reconsider with any pertinent precedent decisions or legal citations that demonstrate our latest decision was based on an incorrect application of law, existing and currently binding precedent, or clearly articulated USCIS policy. In addition, the

motion does not establish that our appellate decision was incorrect based on the evidence of record at the time of the decision. Accordingly, the motion to reconsider is dismissed.

III. CONCLUSION

Considering the letters and other evidence in the aggregate, the record does not establish that the petitioner's work has influenced the field as a whole or that he will otherwise serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

A plain reading of the statute indicates that it was not the intent of Congress that every advanced degree professional or alien of exceptional ability should be exempt from the requirement of a job offer based on national interest. The petitioner has not shown that his past record of achievement is at a level sufficient to waive the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. Although the petitioner need not demonstrate notoriety on the scale of national acclaim, the petitioner must have "a past history of demonstrable achievement with some degree of influence on the field as a whole." *NYSDOT*, 22 I&N Dec. at 219, n.6. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

Although the new evidence submitted by the petitioner provided a basis for granting the motion to reopen under 8 C.F.R. § 103.5(a)(2), the submitted documentation does not overcome the grounds underlying our previous decision. Furthermore, as the petitioner's motion to reconsider is not supported by any pertinent precedent decisions or legal citations that demonstrate our latest decision was based on an incorrect application of law, existing and currently binding precedent, or clearly articulated USCIS policy, the motion to reconsider is dismissed.

We will affirm our prior decision for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The motion to reconsider is dismissed, the motion to reopen is granted, our decision of November 4, 2014, is affirmed, and the petition remains denied.